

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

KEVIN JORY BRAA,

Appellant.

NO. 61464-9-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: June 8, 2009

Leach, J. — Kevin Braa challenges his conviction for manslaughter in the first degree, arguing that the trial court admitted irrelevant, prejudicial, and inflammatory evidence about the circumstances of his arrest. We hold that the trial court did not abuse its discretion when it concluded that the evidence was relevant to show consciousness of guilt and that the probative value of the evidence outweighed its prejudicial effect. We affirm.

**Background**

On the evening of November 11, 2006, Kevin Braa was sitting at the bar reading a book in Kuhnle's Tavern in Marysville. Simeon Whitney was there playing pool with his brother, Roger Enick, and a friend, Kenny Celestine. Whitney, Enick, and Celestine are Native American and went to Kuhnle's Tavern

because it is a hangout for Native Americans.

Enick and another bar patron argued over a game of pool, and the other patron used racial slurs about Native Americans. At some point, Braa went over to the pool table and made offensive comments toward Enick. Whitney pushed Braa out of the way and told him, "Leave my homeboy alone." Braa told Whitney, "Go back to Mexico where you belong. You're a sub-human." When the bartender heard this, she told Braa that he would be asked to leave if he continued to talk that way. Braa did not comply, so she escorted him to the back door. A minute or two later, Whitney went out through the same door.

A fight ensued between Whitney and Braa outside behind Kuhnle's Tavern. Witnesses saw Whitney repeatedly punch Braa and pull Braa's shirt up over his head. After the fight, Whitney started toward the back door of Kuhnle's, and Braa went over to his truck. Braa fired four to six shots at or toward the back door. Some witnesses saw Braa standing by his truck with the door open and his arm extended as he fired. Whitney staggered through the back door and collapsed by the bathrooms. When the bartender heard the gunshots and saw Whitney on the floor, she ducked down and called 911. Two witnesses saw Braa drive away in a white Chevy S-10 pickup.

A police officer who happened to be a few blocks away heard the gunshots and responded to the scene. Whitney had a pulse but was bleeding from the abdominal area and was nonresponsive. He was airlifted to Harborview

and died en route. Later, an autopsy determined Whitney had suffered four gunshot wounds. The wounds showed that the bullets traveled from back to front through Whitney's body. One bullet and fragments from another were recovered from his abdomen. Another bullet exited through the front of his abdomen. The cause of Whitney's death was shock, trauma, and loss of blood due to the gunshot wounds.

Officers found bullet jacket fragments near where Whitney had lain. There were shell casings in the parking lot, as well as the book the defendant had been reading at the bar. Detectives recovered three bullets and bullet shrapnel from the back door area and the carpet just inside the back door. There were two indentations in the metal of the back door, which were consistent with bullet strikes. Detectives also located a bullet hole in an interior wall just inside the back door. Forensic analysis later confirmed that the bullet taken from Whitney's abdominal wall and the bullet found by the back door were fired from the same gun. The four shell casings found in the parking lot were compared and it was forensically determined that all had been fired from one gun.

Braa lived in a two-bedroom trailer that he shared with a roommate, Lenny Graff. Braa returned home around 10:30 on the night of the crime and asked Graff to get some beer, which Graff did. Graff recalled that Braa looked like he had been in a fight, with black eyes and a bloody nose. When Graff returned with the beer, Braa had changed his clothes and no longer looked dirty

or bloody. Graff asked what had happened, and Braa told him that he had “killed a subhuman.” When Graff asked what a subhuman was, Braa responded, “It means if you’re not white, you’re not right.” He told Graff he had been jumped by some Mexicans who wanted to steal his wallet. He refused to discuss further the topic of killing someone and asked Graff to lie and say he had been home all night.

That night, Braa parked his car several feet further from the roadway than he usually did, and he did not move it for the next three days. On November 14, 2006, officers arrived at Braa’s trailer to execute a search warrant and arrest him. They could see Braa inside, through the kitchen window. They announced their presence over the patrol car PA systems. They also used a “hailer,” a box equipped with a loudspeaker, a handle for throwing, and hundreds of feet of cable, to communicate with Braa. Several times, an officer announced, “Kevin Braa, this is the Sheriff’s Office. We have a warrant for your arrest. Identify yourself and surrender,” but Braa did not come out. Officers shone lights into the home, and a helicopter was also used to illuminate the area. After Braa failed to respond to repeated voice commands, officers deployed two pepper spray projectile canisters through a window of the trailer. Braa came outside a few seconds later, complied with officers’ verbal instructions, and was taken into custody.

Four and a half months later, while doing yard work, Graff discovered a

plastic garbage bag under the deck of the trailer. Inside, he discovered Braa's 9mm semiautomatic Ruger handgun. He called 911, and police picked up the gun. Forensic analysis confirmed that the bullet extracted from Whitney's abdominal wall had been fired from that weapon and that one of the four spent shell casings found in the parking lot had also been fired from that weapon. The other bullets and casings were not analyzed because it had already been determined that they had been fired from the same weapon as the tested bullet and casing. An expert in trajectory analysis testified that at least one bullet had been shot from a height of about four and a half feet, within 10 feet of where bullet fragments were imbedded in the wall inside the tavern. The evidence was consistent with the trajectory from a gun held by a person of average height while standing up.

At trial, Braa conceded that he shot the gun and argued that it had been in self-defense. He testified that he had a verbal exchange with some guys he thought were Mexican and that he had called them "Mexicans" and "sub-humans" and "invited them to go back to their own country." He recalled that the bartender had asked him to be quiet and go sit down, and he testified that he did so. Shortly afterward, he left the bar through the back door and as he was leaving was hit over the head and lost consciousness. When he came to, he was being beaten by an unknown assailant. He did not fight back but tried to protect himself by curling up. He tried to get away but was beaten more and

shoved to the ground. He thought he was going to be beaten until he was killed. After being slammed into a vehicle, he got his gun out and fired immediately. He testified that he was slumped, lying on the ground when he fired.

Braa was charged with second degree murder and, in the alternative, first degree manslaughter. The jury found Braa guilty of the alternate charge of first degree manslaughter. In a special verdict form, the jury found Braa was armed with a firearm when he committed the crime. The jury returned blank verdict forms on the charge of second degree murder and the corresponding firearm enhancement.

#### Discussion

Braa assigns error to the trial court's ruling allowing evidence that police used loudspeakers, a helicopter, and pepper spray to force him to leave his home and submit to arrest. He argues that the evidence was used for the improper purpose of showing that he was "a remorseless, calculating killer" and that he was reckless. The State sought to use evidence of Braa's conduct after the shooting, including the circumstances surrounding Braa's arrest, to show consciousness of guilt.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion and will be reversed only if the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.<sup>1</sup>

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<sup>1</sup> State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

Evidence of other crimes, wrongs, or acts is inadmissible to prove character and show action in conformity therewith.<sup>2</sup> However, such evidence may be admissible for other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”<sup>3</sup> The court must balance the probative value of the evidence against any unfair prejudicial effect it may cause.<sup>4</sup>

Evidence of flight may be admitted to show consciousness of guilt.<sup>5</sup> Acts related to flight are also admissible.<sup>6</sup> For example, “[e]vidence of resistance to arrest, concealment, assumption of a false name, and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged crime.”<sup>7</sup> Other acts, such as giving a false name or threatening a witness, have also been held admissible to show consciousness of guilt.<sup>8</sup>

In his trial brief, Braa argued that evidence about the circumstances of his arrest was not relevant because he was not hiding, fleeing, or arming himself for a standoff. In ruling on pretrial motions in limine, the trial court weighed the

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<sup>2</sup> ER 404(b); State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001).

<sup>3</sup> ER 404(b).

<sup>4</sup> Freeburg, 105 Wn. App. at 497.

<sup>5</sup> State v. Hebert, 33 Wn. App. 512, 515, 656 P.2d 1106 (1982).

<sup>6</sup> Freeburg, 105 Wn. App. at 497.

<sup>7</sup> Freeburg, 105 Wn. App. at 497-98.

<sup>8</sup> State v. Chase, 59 Wn. App. 501, 507-08, 799 P.2d 272 (1990) (evidence that defendants gave false names when first contacted by police admissible to show consciousness of guilt); State v. McGhee, 57 Wn. App. 457, 788 P.2d 603 (1990) (evidence that defendant threatened witness admissible to tie defendant to victim and to show consciousness of guilt).

probative value against the potential prejudicial effect and held that evidence regarding the circumstances of the arrest would be allowed but would be limited to some extent, reserving ruling on the exact parameters until a later point in the trial. The court prohibited the State from making any references related to Braa's behavior at the time of arrest during jury selection or opening statements.

When the issue was raised again, the prosecutor described the evidence he planned to elicit, including the fact that police used loudspeakers and a hailer, a helicopter, lights, and finally pepper spray to force Braa out of his home. Braa objected, arguing that the evidence was irrelevant and prejudicial and that the only relevant behavior was the fact that Braa left the scene after the shooting. The trial court noted that the evidence that had been heard established that Braa had left the scene, made statements to Graff when he got home, including instructions not to tell anyone what had happened, and that Graff had not seen Braa move his truck during the three days following the shooting. The trial court held that evidence of the manner in which Braa was arrested was relevant, including evidence that when police arrived and contacted him he did not come out of the trailer, that he was hailed, that lights were shone on him, that after some period of time police used pepper spray, and that he did not cooperate. The court excluded as prejudicial evidence that a SWAT team and armored personnel carrier were present.

The trial court did not abuse its discretion when it determined that some of



the evidence relating to the circumstances of Braa's arrest was relevant and that the probative value of that evidence outweighed its potential prejudicial effect. The evidence was probative to show that Braa was aware of a police presence outside his home and that he refused to cooperate with police for a period of time. The trial court admitted evidence that showed Braa delayed his cooperation with police and excluded prejudicial evidence of the SWAT team and armored personnel carrier. There was no abuse of discretion.

Braa argues that the court abused its discretion by admitting evidence of the manner in which police arrested Braa to explain facial injuries depicted in post-arrest photographs. However, in the context of the trial, the State sought to admit the evidence to show Braa's state of mind, specifically consciousness of guilt. Because Braa had facial injuries in post-arrest photos shown to the jury, the court allowed evidence that officers had tackled Braa to the ground when arresting him in order to explain those injuries. However, defense counsel recognized at trial that the evidence surrounding Braa's arrest also could be used to infer consciousness of guilt. Furthermore, the only inference drawn by the State in its closing argument regarding Braa's failure to exit the trailer after being hailed by police was that Braa knew he was guilty.

Finally, Braa argues that he was prejudiced because the evidence that Braa disregarded officers' authority and refused to comply with their commands allowed the jury to infer that he was reckless. He argues that the jury

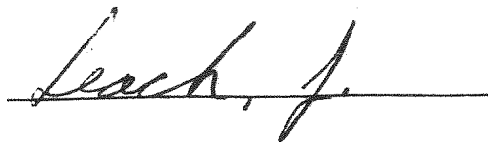
necessarily found that he acted recklessly rather than intentionally because they found him guilty of manslaughter rather than murder. The instruction on recklessness stated,

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

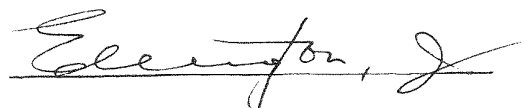
Recklessness also is established if a person acts intentionally.

Because recklessness can also be established if a person acts intentionally, the verdict does not show whether the jury found that Braa acted recklessly rather than intentionally. Moreover, the evidence of Braa's failure to cooperate was properly used to show consciousness of guilt. The evidence that Braa disregarded police was not used to show that he previously disregarded a substantial risk that a wrongful act may occur. The trial court weighed the probative value of the evidence against its prejudicial effect and excluded evidence that did not survive the balancing test. The trial court did not abuse its discretion.

Affirmed.

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WE CONCUR:

A handwritten signature in cursive script, reading "Eberly, J.", written over a horizontal line.

*Appelwick J*